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No. 87-154

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSHUA DESHANEY, a Minor, by his Guardian ad litem, and MELODY DESHANEY,

Petitioners,

v.

WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES, WINNEBAGO COUNTY, ANN KEMMETER and CHERYL STELSE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, U.S. CONFERENCE OF MAYORS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, AND INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Due Process Clause imposes a duty on county welfare agencies and their employees to provide child protective services in an adequate manner.

2. Whether gross negligence or recklessness on the part of county officials in providing protective services can constitute a deprivation of rights under the Due Process Clause.

3. Whether local government liability under 42 U.S.C. § 1983 can be predicated on a subordinate official's violation of government policy.

4. Whether the individual respondents are protected by official immunity from Section 1983 liability for a novel constitutional violation.

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INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.

Amici are concerned that a reversal in this case would vastly expand the liability of state and local governments under 42 U.S.C. § 1983. Petitioners seek to hold the County and individual child welfare professionals liable because they did not prevent the severe abuse of a child by his father, the child's lawful custodian. *Amici* and their members are deeply concerned about Joshua DeShaney and other victims of the senseless cruelty of child abuse. The brutality of Randy DeShaney and the severity of Joshua's injuries, however, should not be permitted to obscure the underlying legal issue: whether the County is constitutionally liable for the father's crime because a social worker failed to take some action that might have prevented injuries to the child.

Private violence, no matter how severe or how tragic the consequences, is still private violence. Petitioners' claims cannot be upheld unless the Court abrogates important limitations on the liability of local governments under Section 1983, as well as the official immunity of local government officials. Further expansion of Section 1983 liability to include claims far removed from the core concerns of the Due Process Clause would divert ordinary state law tort claims to the federal courts and impose substantial additional costs on state and local governments.

Amici are also concerned that a reversal would result in a mandate under Section 1983 empowering the federal courts to address child abuse and other family law issues that are the recognized province of state and local governments. Child abuse is one of the grave problems of our society that governments at all levels are grappling with today. The discretion of those governments to address child abuse, or similar social problems, should not be controlled by a federal common law of social work or curtailed by the threat of litigation every time a tragedy occurs.

Amici submit that the decision below is correct. Because this Court's decision will have a direct effect on matters of prime importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[1]

STATEMENT

Petitioners Joshua and Melody DeShaney brought this action under 42 U.S.C. § 1983, claiming that they were deprived of their liberty without due process of law by respondents because social worker Ann Kemmeter; her supervisor, Cheryl Stelse; her employer, the Winnebago County Department of Social Services; and Winnebago County failed to intervene effectively in a case of suspected child abuse. Finding no constitutional basis for these claims, the district court entered summary judgment in favor of respondents. The court of appeals affirmed.

Joshua DeShaney was born in Wyoming in 1979. In December 1980, a Wyoming court awarded Randy DeShaney custody of Joshua following Mr. DeShaney's divorce from Melody DeShaney. Randy DeShaney thereafter moved with his son to Winnebago County, Wisconsin. In March 1984, while in his father's custody, Joshua was brutally beaten by his father and suffered critical brain injuries.

Respondent Ann Kemmeter's involvement with Randy and Joshua DeShaney began in January 1983, when Randy's girlfriend Marie DeShaney (Joshua's half-aunt) brought Joshua, covered with bruises, to Theda Clark Regional Medical Center. Marie DeShaney stated that another child had inflicted the bruises, but the emergency room staff suspected child abuse and alerted respondent Winnebago County Department of Social Services (the "Department").

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[1] The parties' letters of consent, pursuant to Rule 36 of the Rules of the Court, have been filed with the Clerk.

By the end of the day, the Department had obtained an order placing Joshua in the temporary custody of the Medical Center. The Department convened a "child protective team" consisting of a pediatrician, a psychologist, a police detective, a lawyer for respondent Winnebago County (the "County"), and respondents Kemmeter and Stelse. The county attorney concluded that there was insufficient evidence of child abuse to retain Joshua in county custody; and he was therefore returned to his father. As the court of appeals observed, there is no evidence that the Department was reckless in making this decision. Pet. App. 42-43.

Although the child-protection case was closed three weeks later, respondent Kemmeter made periodic visits to the DeShaney household and maintained a file on Joshua. Ms. Kemmeter was aware that Joshua had suffered repeated suspicious injuries, although, in each instance, Randy DeShaney offered an innocent explanation. Ms. Kemmeter's last visit occurred on March 7, 1984, when Randy DeShaney informed her that Joshua had fainted in the bathroom several days earlier for no apparent reason. Ms. Kemmeter did not ask to see Joshua.

The following day, Randy DeShaney beat his son so severely that the child suffered grave neurological damage and was hospitalized. Respondents subsequently placed Joshua in a foster home for profoundly retarded children. Randy DeShaney was convicted of child abuse and sentenced to prison.

SUMMARY OF ARGUMENT

On its face, the question whether a county social welfare agency adequately implemented the State's child welfare program is a question of state law for state courts. Petitioners cannot succeed in constitutionalizing this question without vastly expanding the liability of local government agencies and officials. Reversal in this

case would require that the Court radically alter at least four principles that limit such liability under Section 1983.

First, the Due Process Clause acts to restrict the powers of government, not to impose upon it affirmative duties to provide social welfare services. Petitioners ask the Court to impose on government welfare agencies an affirmative constitutional duty to prevent child abuse when they are aware of a risk to a child. The Constitution provides no source for this affirmative duty, particularly in this case, where Joshua DeShaney was not in the County's custody, but in the legal and physical custody of his abusive father.

Even if petitioners' claims could be grounded in the Constitution, recognition of those claims would entail an extraordinary and unwarranted intrusion into areas of fundamental state concern. This Court has recognized the primacy of the States in dealing with issues of family law, and the federal courts are ill-suited to make these decisions. Nor is it sound policy to subject the decisions of county welfare workers to the *ex post facto* scrutiny of the federal courts. Finally, there is no principled basis for distinguishing child welfare services from other protective services. As a result, reversal in this case could constitutionalize analogous duties of other government employees, including parole officers, police officers, and paramedics.

Second, even if petitioners could show a constitutional right to official protection from private violence, they could not pursue a claim of deprivation based on, at most, allegedly reckless conduct. The language and jurisprudence of the Due Process Clause limit violations to conduct that can fairly be called intentional. To hold otherwise would permit the negligence claims prohibited by *Daniels v. Williams*, 474 U.S. 327 (1986), to be pursued at least to trial—and frequently to judgment—under the guise of gross negligence or recklessness.

Third, petitioners can recover against the County and the Department only on the theory of respondeat superior liability, which has been repeatedly disavowed by the Court. Petitioners rely on respondent Kemmeter's infractions of County policy as the basis for their due process claims. They cannot also assert that the same policy, if followed, would have caused a due process violation, as required by *Monell v. Department of Social Services*, 436 U.S. 658 (1978). Petitioners are further precluded from establishing liability under *Monell* because (a) the County's policy is constitutional, a point that petitioners do not dispute, and (b) their claims are based on a single episode of alleged misconduct.

Finally, the doctrine of official immunity protects the individual respondents from liability. Child welfare workers, as executive officials, are entitled to qualified immunity for discretionary actions taken in good faith. Because the individual respondents could not have anitcipated that they had a federal constitutional duty to prevent child abuse, their conduct fell within the scope of qualified immunity.

ARGUMENT

I. THE DUE PROCESS CLAUSE IMPOSES NO DUTY TO PROVIDE SOCIAL SERVICES IN AN ADEQUATE MANNER.

The Due Process Clause does not impose affirmative duties on the States. It is, instead, "a restraint upon the power of the States." *The Slaughter-house Cases*, 83 U.S. (16 Wall.) 36, 80 (1873). *The Civil Rights Cases*, 109 U.S. 3, 11 (1883), recognized that, under the Due Process Clause, "[i]t is State action of a particular character that is prohibited." In holding that only state action violates the Constitution, the Court specifically observed that "individual invasion of individual rights is not the subject-matter of the amendment." *Id.* The fundamental understanding of the Constitution as a limitation on the power of the States, not a mandate of affirmative duties, continues to the present. *See, e.g., Kadrmas v. Dickinson Public Schools*, 108 S. Ct. 2481, 2489 (1988); *Youngberg v. Romeo*, 457 U.S. 305, 317 (1982); *Harris v. McRae*, 448 U.S. 297, 318 (1980).

The government's "duty" to protect members of the public at large from private violence is one such affirmative obligation not found in the Constitution. As petitioners and their *amici* recognize, the Constitution does not impose such a generalized duty on the government. Pet. Br. at 12-13; Brief *Amicus Curiae* of the American Civil Liberties Union, *et al.* (hereinafter "ACLU" and "ACLU Br."), at 9. *See Martinez v. California*, 444 U.S. 277, 284-85 (1980). At least in the absence of physical custody of the claimant, as in *Youngberg v. Romeo*, 457 U.S. at 317 (involuntarily committed mental patients), there is no basis under the Constitution for requiring state and local governments to provide any services, regardless of what state law may require.

It is undisputed that respondents did not injure Joshua DeShaney. Joshua was critically injured by his father, and petitioners do not contend that Randy DeShaney's brutal acts can be directly attributed to respondents. Thus, petitioners' claim depends on the existence of an affirmative obligation of government under the Due Process Clause[2] to protect suspected victims of child abuse from the violence of their own parents, an obligation that cannot be squared with the Court's consistent view of that Clause as a limitation on power and not an affirmative grant of rights. Moreover, although petitioners have identified certain characteristics of child protective services that distinguish them from other government pro-

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[2] Our reference throughout is to the Due Process Clause of the Fourteenth Amendment, although the Due Process Clause of the Fifth Amendment would subject federal agencies and officials to the same liability if petitioners' arguments were accepted.

grams, none of these distinctions provides a *constitutional* basis for thrusting the federal courts into the province of state and local governments or burdening those governments with costly new obligations to provide adequate social services.

A. The "Special Relationship" Doctrine Does Not Furnish A Constitutional Basis For Imposing Affirmative Duties On State And Local Governments.

To subject state and local governments to new affirmative duties, petitioners rely on court of appeals decisions creating a doctrine of "special relationships." Under these cases, certain factors can compel governments to provide protective social services to potential victims of private violence. These factors are primarily (a) the expressed desire to protect a particular class of individuals; (b) knowledge of the victim's plight; and (c) legal custody. See Pet. Br. at 14, citing *Jensen v. Conrad*, 747 F.2d 185, 194-95 n.11 (4th Cir.), *cert. denied*, 470 U.S. 1052 (1984).[3]

As applied to this case, none of the "special relationship" factors have constitutional significance, whatever their significance under state law.[4] The government's

[3] This line of cases includes *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (en banc), *pet. for cert. filed*, 56 U.S.L.W. 3290 (U.S. Sept. 25, 1987) (No. 87-521); *Estate of Bailey v. County of York*, 768 F.2d 503 (3d Cir. 1985); *Doe v. New York City Dep't of Social Services*, 649 F.2d 134 (2d Cir. 1981), *cert. denied*, 464 U.S. 864 (1983).

Like the courts below, other circuits have rejected the doctrine. *See Harpole v. Arkansas Dep't of Human Services*, 820 F.2d 923 (8th Cir. 1987); *Washington v. District of Columbia*, 802 F.2d 1478, 1481-82 (D.C. Cir. 1986); *Estate of Gilmore v. Buckley*, 787 F.2d 714 (1st Cir.), *cert. denied*, 107 S.Ct. 270 (1986). *Harpole* involved facts virtually identical to those presented here.

[4] Massachusetts, for example, has developed a doctrine of special relationships under its common law, without any reliance on the Due Process Clause. *See A.L. v. Commonwealth*, 521 N.E.2d 1017 (Mass. 1988).

generalized desire to protect a class of individuals has no constitutional relevance whatsover. Because that desire will be present in all social programs intended to protect citizens, it provides no meaningful limit on the kinds and extent of affirmative obligations that would be created. Moreover, this Court has repeatedly held that a State's deprivation of state-created rights does not violate the Due Process Clause unless those rights amount to a constitutionally protected property interest. *See, e.g., Baker v. McCollan*, 443 U.S. 137 (1979); *Paul v. Davis*, 424 U.S. 693 (1976); *Screws v. United States*, 325 U.S. 91 (1945). *A fortiori*, a mere expressed intent to protect a class—even if accompanied by a procedure to facilitate protection—does not create a constitutional right to protection. To hold otherwise would convert every government social service, and possibly every statement of policy, into a constitutional right.

The second factor, knowledge of the victim's plight, also cannot impose on government an affirmative duty to protect. Surprisingly, the authority cited for this factor is the Court's failure to reach this question in *Martinez v. California*, 444 U.S. 277 (1980). *See, e.g., Estate of Bailey v. County of York*, 768 F.2d 503, 510 (3d Cir. 1985). *Martinez* held that the California Parole Board could not be liable under the Due Process Clause for a murder committed by a parolee five months after his release on parole. In limiting the scope of its ruling, the Court, noting that the Board was unaware of the danger to a particular victim, stated that, "[w]e need not *and do not decide* that a parole officer could never be deemed to 'deprive' someone of life by action taken in connection with the release of a prisoner on parole." 444 U.S. at 286 (emphasis added). Some lower courts have nonetheless taken this considered refusal to speculate as an established principle supporting imposition of liability.

Analytically, knowledge of a risk to an identified person is of no greater constitutional significance than a generalized intent to benefit the class to which that person belongs. The suggestion that knowledge creates the duty is an impermissibly circular proposition; the constitutional duty defines the weight, if any, to be given to knowledge.

Moreover, to hold that knowledge of a risk is sufficient to create a constitutional duty would extend the reach of the Due Process Clause in a revolutionary manner. Many government agencies, especially police departments, fire departments, and child welfare agencies, compile files identifying potential victims at risk. Because of their limited resources, these agencies are daily asked to assign priorities among these risks. Liability based on knowledge of a risk would render any failure by these agencies to provide adequate protective services actionable. But the Due Process Clause has never been thought to mandate supervision by the federal courts of decisions made in the face of potential risks.

The final factor, legal custody, is not present in this case.[5] Were it present, it would not require a different result. Legal custody is insufficient to impose affirmative federal constitutional duties on the government, unless it is accompanied by physical custody that impinges on the liberty interests of the citizen. Legal custody is insuffi-

[5] The initial decision granting Randy DeShaney custody of his son was made in Wyoming, not Wisconsin. The child was in temporary state custody in Wisconsin only during the period of his hospitalization in January 1983. At that time, the hospital convened a team of doctors and social workers that determined that there were insufficient grounds for terminating Randy DeShaney's parental rights. The court of appeals held that this decision was not reckless (Pet. App. 42-43), and there is no evidence that this determination was even negligent.

cient because state law determines legal custody and its legal significance. For example, the State may retain legal custody of an orphan who is placed with foster parents. Yet, if the State relinquishes parental responsibilities to the foster parents under state law, no liberty interest of the child is impinged once the child has been properly placed. *See Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502, 510-11 (1982). In *Lehman*, the Court noted that, for purposes of federal habeas corpus under 28 U.S.C. § 2254, foster children "are in the 'custody' of their foster parents in essentially the same way, and to the same extent, other children are in the custody of their natural or adoptive parents. . . . [T]hey suffer no unusual restraints not imposed on other children."

This Court has recognized that certain responsibilities may attach under the Due Process Clause where the State has physical custody.[6] In *Youngberg v. Romeo*, 457 U.S. 305 (1982), a suit by an involuntarily committed mental patient, the Court explicitly premised the State's duties on its preexisting deprivation of the patient's liberty:

> As a general matter, a State is under no constitutional duty to provide substantive services for those within its border. When a person is institutionalized—and wholly dependent on the State—it is conceded by petitioners that a duty to provide certain services and care does exist, although even then a

[6] Even the ACLU recognizes, although it rejects, "the attractiveness of [physical] custody as a bright line for determining the limits of liability." ACLU Br. at 44. In fact, physical custody is a necessary but not a sufficient condition for recovery. The Fourteenth Amendment does not constitutionalize all common law duties owed to a person in custody. *See Daniels v. Williams*, 474 U.S. 327, 332 (1986).

> State necessarily has considerable discretion in determining the nature and scope of its responsibilities.

Id. at 317 (citations omitted).[7] *See also Hutto v. Finney*, 437 U.S. 678 (1978) (Eighth Amendment case involving state prisoners).

These cases depend on the concept that government, when it deprives a person of liberty and the inherent capacity for self-protection, assumes the responsibility to minimize other intrusions into protected liberty interests. Absent that preexisting deprivation, there is no constitutional basis for imposing affirmative duties.

Petitioners assert that it would be appropriate to impose affirmative constitutional duties in this case because respondents' authority under Wisconsin law "preempted" the rescue efforts of others. Their assertion is simply incorrect. Neither respondents nor the Wisconsin Children's Code prevented neighbors, police, or petitioner Melody DeShaney, Joshua's mother, from investigating or reporting his condition. In fact, the Children's Code mandates that the sheriff or police must immediately investigate allegations of child abuse upon request. Wis. Stat. Ann. § 48.981(3)(b) (1987). Petitioners identify no evidence that Melody DeShaney was aware of respondents' involvement with Joshua or that anyone else failed to report, investigate, or restrain Randy DeShaney because they relied on the Department.

Even if there were evidence of reliance on the Department, petitioners could not show a deprivation of constitutional rights because they have no entitlement to the

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[7] The ACLU cites *Ingraham v. Wright*, 430 U.S. 651 (1977), which limited corporal punishment of school children. Although *Ingraham* recognized a liberty interest in freedom from government intrusions on personal security (*id.* at 673), the remedy was to restrain action by the State, not to require the State to prevent the violence of others. Moreover, school children are compelled by law to attend school and are in the physical custody of the State while there.

intervention of others. There is no constitutional right to government social services (*Harris v. McRae*, 448 U.S. at 317-18), much less to the services of private citizens. And even if state law imposes a duty of care on a would-be rescuer who preempts the rescue efforts of others, there is no basis for transforming this common law principle into a constitutional right.

In the end, petitioners seek to create a constitutional violation out of respondents' shortfall in achieving their own aspirations, namely to prevent child abuse. The Due Process Clause does not transform those aspirations into constitutional duties.[8]

B. Petitioners' Claims Threaten An Extreme And Unwarranted Intrusion Into The Traditional Role Of The States.

To hold that the Due Process Clause imposes widespread affirmative duties "would mark a drastic change in our understanding of the Constitution." *Harris v. McRae*, 448 U.S. at 318. Because there is no constitutional foundation for these duties, it is not necessary to demonstrate why the harm to state and local governments of a reversal would drastically outweigh any social good from such a decision. Yet, the weakness of petitioners' claim is underlined by identifying only the most obvious effects of reversal on the administration of state social services.[9]

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[8] In this Court, petitioners argue for the first time that they had an "entitlement" under the Due Process Clause to the social services mandated by the Wisconsin Children's Code, Wis. Stat. Ann. § 48.01 *et seq.* (1987). Because this procedural due process argument (*see Board of Regents v. Roth*, 408 U.S. 564, 570 (1972)) was not presented for decision in the lower courts, it cannot furnish a basis for reversal here. *See, e.g., Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984). In any event, petitioners cannot transmogrify *Roth* into a constitutional entitlement to social services without rendering the entire spectrum of state social services subject to federal regulation.

[9] Even when a deprivation of a protected liberty interest has been shown, the Court will compare the burdens imposed on the State

1. *Family law concerns are matters for the States to resolve.*

The law of family relationships remains, as it always has been, a concern of state law. *See, e.g., Thompson v. Thompson*, 108 S. Ct. 513, 520 (1988); *Rose v. Rose*, 107 S. Ct. 2029 (1987); *Pennoyer v. Neff*, 95 U.S. (5 Otto) 714, 734-35 (1878). Many of the decisions affecting family relationships are made by specialized state family or juvenile courts that deal with these issues on a daily basis.

Allowing petitioners to bring their claims under the Due Process Clause would inescapably turn federal courts into alternative and highly inappropriate domestic relations forums. Petitioners' claims would turn, at trial, on whether respondents provided adequate child welfare services to Joshua DeShaney. Yet, as the Court has repeatedly observed (most recently in *Thompson v. Thompson*, 108 S. Ct. at 520), the federal courts "have little expertise to resolve" family law issues. It is doubtful that federal judges ever could gain sufficient expertise. No federal judge would want, let alone see, sufficient numbers of cases to be able to place the behavior of a given social worker or parent in context. As the court of appeals explained below:

> Balancing the rights of parents with those of their children is a task as difficult as it is delicate, and we doubt that it will be performed better under the eyes of federal courts administering constitutional law than by the state judicial and administrative authorities. "The federal courts . . . are not local institutions, they do not have staffs of social workers, and there is too little commonality between family law adjudication and the normal responsibilities of federal judges to give them the experience they would need to be able to resolve domestic disputes with skill and sensitivity." *Lloyd v. Loeffler*, 694 F.2d 489, 492 (7th Cir. 1982).

Pet. App. 44.

The ACLU has inadvertently emphasized the difficulty. To support the doubtful proposition (discussed below) that federal liability would not unduly affect the actions of social workers, it sets forth "generally accepted standards in child protection" that the federal courts would be called on to apply. ACLU Br. at 36; see *id.* at 37-38 (identifying sources of "authoritative standards"). But to apply these standards in the difficult cases that come to trial, the federal courts would have to create a federal common law governing social services.

Thompson demonstrates a related problem. In *Thompson*, the petitioner filed suit in federal court under the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A, to overturn an adverse state court custody decision. Holding that no right of action could be implied, the Court indicated that the federal courts should not resolve "traditional domestic-relations inquiries," including whether "the child has been abandoned or abused." 108 S. Ct. at 520 n.4. Petitioners' claims would require the federal courts to make precisely this type of inquiry. Moreover, because injunctive relief is available under Section 1983, federal courts could be asked to override the custody decisions of state agencies at the time those decisions are made, as well as to second-guess them after they are made, as in this case.[10]

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and the individual before finding a constitutional violation. *See Youngberg v. Romeo*, 457 U.S. at 322-23.

[10] The availability of injunctive relief could lead to even greater federal intrusion. One author cited by the ACLU has asserted the desirability of "structural injunctions" to reform the provision of social services to children. See Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 Harv. Civ. R.-Civ. L. L. Rev. 199 (1988). Such injunctions would deprive state and local governments of their freedom to determine for themselves how the difficult problem of child abuse should be addressed.

There simply is no imperative for pushing these cases into federal court.[11] While any incident of child abuse is disturbing, there is no evidence that victims of child abuse are disfavored under state law or victims of bias in state courts.[12] The detailed Wisconsin statutory scheme upon which petitioners rely is persuasive evidence to the contrary.

In reality, intervention by the federal courts could well undermine the quality of government social services. The standards governing social work would be determined exclusively by an adversary process, never intended to determine sound policy and easily manipulated by clever counsel. The decisions of the federal courts would not only dictate the standards a social worker must follow at her peril, but would lead to new bureaucratic requirements so that the social worker could document her adherence to such standards. The prospect of unlimited federal court judgments against individual social workers and their agencies may well ensure adherence to whatever federal standards are decreed, but will also deter social workers from acting on their "honest judgment" that the best interests of the child require other action. *Lehman v. Lycoming County Children's Services Agency*, 458 U.S. at 514 n.18.[13]

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[11] In this case, the only purported inadequacy of state court remedies identified by petitioners is Wisconsin's $50,000 limitation on damage awards against respondents. See Wis. Stat. Ann. § 893.80(3) (1987). Petitioners, however, have not challenged the constitutionality of this limitation. If the limitation is valid, no purpose is served by allowing petitioners to use Section 1983 to circumvent the statute.

[12] The Equal Protection Clause serves to prevent state and local governments from refusing to provide services for invidious reasons such as racial discrimination. *See, e.g., Brown v. Board of Education*, 347 U.S. 483 (1954).

[13] For example, if petitioners prevail here, it would be an intrepid social worker who would fail to insist on seeing a child on any home visit, even if the refusal to accept a parent's assertion that the child

The court of appeals detailed an additional dilemma (Pet. App. 44-45). Child welfare workers already face potential liability under state and possibly federal law if they improperly remove a child from a parent's custody. *See, e.g., Lossman v. Pekarske*, 707 F.2d 288, 290 (7th Cir. 1983); *Drabek v. Sabley*, 142 N.W.2d 798 (Wis. 1966). Social work is sufficiently difficult without the threat of liability whether the child remains with his parent or is removed from the parent's custody. There is certainly no federal constitutional basis for creating an incentive to terminate parental custody which, unlike state social services, is a fundamental constitutional right.

2. *The federal courts should not reallocate expenditures in state social welfare budgets.*

Constitutional liability for allegedly incompetent social work could diminish the availability as well as the quality of state social services. Given the disturbing facts of any child abuse case, million-dollar verdicts against government agencies and officials are likely. These verdicts, as well as litigation costs incurred regardless of the verdict, would necessarily direct state expenditures away from the provision of services. Such reallocation is a policy matter for state legislatures, not the federal courts.[14]

The threat of litigation costs diminishing the availability of social services is real. *Amici* regretfully acknowledge that child abuse is all too prevalent in this country, despite the best efforts by state and local governments to prevent it. The ACLU notes the distressing

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was sick or sleeping would destroy the social worker's relationship with the parent.

[14] Indeed, the ACLU's arguments (Br. at 6-7) suggest that state and local governments would be better advised to eliminate such services entirely; for although they are concededly not constitutionally compelled, they are said to furnish a basis for liability once undertaken.

statistic that there were 2,250,000 reports of suspected child abuse or neglect in 1987. ACLU Br. at 44. In many cases, there will be indications that, in hindsight, might have alerted a social worker to possible abuse. Especially given petitioners' contention that nonintentional (*i.e.*, reckless or grossly negligent) behavior is sufficient to bring a Section 1983 action to a jury, there is every reason to expect claims like petitioners' to proliferate.

3. *Reversal would create a generalized constitutional right to government protective services.*

The federal courts are not underutilized. The proposed (although deficient) constitutional basis of petitioners' claims cannot be confined to cases of suspected child abuse in any principled way. Where a government agency or official is aware that an individual citizen is at risk and responds in a manner judged in hindsight not to be adequate, new classes of cases will be brought—in volume—under Section 1983. Among the most obvious categories of defendants are police officers, parole officers, paramedics, prison guards, and state-employed physicians, including psychiatrists.

It is not speculation that these cases will be brought. Beginning with *Martinez v. California*, 444 U.S. 277 (1980), a suit against the California Parole Board, these cases have been filed even without encouragement from this Court.[15] In the end, the federal courts will be compelled to create a common law governing the actions of these additional classes of defendants as well as child abuse caseworkers.

Foster care services would be particularly vulnerable to this type of litigation. Two circuits have already held

[15] *See, e.g., Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1988) (en banc) (paramedic service); *Wideman v. Shallowford Community Hospital, Inc.*, 826 F.2d 1030 (11th Cir. 1987) (ambulance drivers); *Commonwealth Bank & Trust Co. v. Russell*, 825 F.2d 12 (3d Cir. 1987) (prison officials).

that these suits are cognizable.[16] Reversal in this case, where the child resided with his natural parent, would necessarily imply corresponding duties for government agencies continuously to monitor foster care agencies and foster parents. The financial consequences of liability could substantially impair, if not destroy, foster care services in many States.

In sum, a decision recognizing petitioners' claims under the Due Process Clause would be far-reaching and pernicious. There is neither a constitutional foundation nor a practical justification to warrant a massive federal intrusion into areas that are quintessentially the province of the States.

II. THE COURT SHOULD NOT TRIVIALIZE THE DUE PROCESS CLAUSE BY PERMITTING SECTION 1983 ACTIONS TO PROCEED TO TRIAL ON ALLEGATIONS OF GROSS NEGLIGENCE OR RECKLESSNESS.

The Due Process Clause prohibits "*deliberate* decisions of government officials to deprive a person of life, liberty, or property." *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (emphasis in the original).[17] It is intended to prevent "abuse of power by the government." *Id.* at 330. *Daniels* relied heavily on Justice Powell's opinion in *Parratt v. Taylor*, 451 U.S. 527 (1981), which had concluded:

> A "deprivation" connotes an intentional act denying something to someone, or at the very least, a deliberate decision not to act to prevent a loss. The most

[16] *See Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (en banc), *pet. for cert. filed*, 56 U.S.L.W. 3290 (U.S. Sept. 25, 1987) (No. 87-521); *Doe v. New York City Dep't of Social Services*, 649 F.2d 134 (2d Cir. 1981), *cert. denied*, 464 U.S. 864 (1983).

[17] Of course, the Court need not reach this question if it finds that petitioners have not been deprived of an interest protected by the Due Process Clause.

> reasonable interpretation of the Fourteenth Amendment would limit due process claims to such active deprivations.

Id. at 548 (concurring opinion). *See also Estelle v. Gamble*, 429 U.S. 97, 105 (1976) ("deliberate indifference" to prisoner's serious illness or injury sufficient to constitute cruel and unusual punishment under the Eighth Amendment); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) ("the touchstone of due process is protection of the individual from arbitrary action"); *cf. West v. Atkins*, 108 S.Ct. 2250, —— (1988) (Scalia, J., concurring) ("deliberate indifference" by physician causing physical harm to prisoner constitutes the deprivation of liberty without due process).

"Abuse of power" strongly suggests that intentional malfeasance is required to state a claim of constitutional stature.[18] At the very least, it requires such deliberate indifference that intent can be inferred. For example, in *Estelle v. Gamble*, 429 U.S. 97 (1976), the allegations of deliberate indifference held sufficient to state an Eighth Amendment claim concerned the indifference "by prison guards in *intentionally* denying or delaying access to medical care or *intentionally* interfering with the treatment once prescribed." *Id.* at 104-05 (emphasis added). Claims based on negligence do not suffice. *See Daniels, supra; Davidson v. Cannon*, 474 U.S. 344 (1986). Nor, in our view, do claims of gross negligence or even recklessness.[19] Permitting the trial of such allegations in

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[18] The cases cited in the text all arose in the prison context, where the State, having assumed physical custody, might well be held to a higher standard of care because of its assumption of responsibility for personal security. See pages 10-12, *supra*.

[19] Neither *Smith v. Wade*, 461 U.S. 30 (1983), nor Justice O'Connor's dissent in *City of Springfield v. Kibbe*, 107 S. Ct. 1114, 1121 (1987), casts any light on the state of mind necessary to show a violation of the Due Process Clause. *Smith v. Wade* was

federal court would eviscerate the Court's repeated decisions that garden-variety tort actions against state officials must be brought under state law. *See, e.g., Daniels*; *Davidson v. Cannon*, 474 U.S. 344 (1986); *Paul v. Davis*, 424 U.S. 693 (1976).

Gross negligence is simply negligence "with the addition of a vituperative epithet" (*Wilson v. Brett*, 152 Eng.Rep. 737, 739 (Ex. 1843) (Rolfe, B.)); and recklessness, also an aggravated form of negligence, can be defined as lack of due care in the presence of an obvious risk of harm.[20] Like simple negligence, gross negligence and recklessness are insufficient to show the abuse of power required by *Daniels*.[21] Especially where, as here, injury results from violence inflicted by private persons, an official's failure to prevent it is not an "abuse of power," unless that failure is deliberate and knowing.[22]

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concerned with the state of mind necessary to support punitive damages under Section 1983. *Smith v. Wade* explicitly distinguished the state of mind necessary for punitive damages under the statute from the state of mind necessary to show the underlying constitutional violation. 461 U.S. at 50.

Similarly, Justice O'Connor's opinion in *Kibbe* dealt only with the state of mind sufficient to establish a policy under *Monell v. Department of Social Services*, 436 U.S. 658 (1978) (discussed *infra*, Part III), without discussing whether reckless conduct can give rise to a due process violation.

[20] See W. Prosser & W. Keeton, *The Law of Torts* 213, 214 (5th ed. 1984).

[21] *See Hogan v. City of Houston*, 819 F.2d 604, 605 (5th Cir. 1987) (gross negligence insufficient); *Washington v. District of Columbia*, 802 F.2d 1478, 1481 (D.C. Cir. 1986) (same).

[22] It is not necessary to decide in this case that no behavior that could be called "reckless" can ever constitute a due process violation. For example, there may be instances of criminal recklessness

Unintentional actions, even when they are grossly negligent, do not violate the Due Process Clause. Gross negligence is not, as petitioners and the ACLU argue, analogous to "deliberate indifference." *Estelle v. Gamble* equated deliberate indifference with intentional conduct (see page 20, *supra*).

Holding allegations of gross negligence or recklessness sufficient to state a claim would, in practical consequence, overrule *Daniels*. *Daniels* noted that the difference between intent and negligence "is abundantly clear." 474 U.S. at 335. The distinction between negligence and recklessness, let alone gross negligence, is not.[23] Many tort lawyers routinely plead negligence in the alternative as gross negligence or recklessness. The complaint in this case (¶ 44, J.A. 11) is an example. If it is held to state a claim, plaintiffs will simply satisfy the pleading requirements and proceed in federal court. Moreover, because allegations of gross negligence or recklessness raise questions of fact, they are ordinarily not subject to dismissal or summary judgment prior to trial.

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that are tantamount to intent and could therefore require a different analysis. *Cf. Whitley v. Albers*, 475 U.S. 312 (1986). In this case, however, Ms. Kemmeter at the most "recklessly" failed to act effectively to prevent the abuse of Joshua DeShaney. Petitioners have adduced no evidence that she (or any other respondent) intended that harm come to Joshua or was deliberately indifferent to his plight. Ms. Kemmeter's repeated visits and her own notes (*e.g.*, "I continue to have a great deal of concern over the welfare of Joshua" (J.A. 118)) are strong evidence to the contrary.

[23] Petitioners certainly do not explain the distinctions between negligence and gross negligence or recklessness. They assert that respondents' alleged "misconduct" was "beyond mere negligence" (Pet. Br. at 33), but they offer no further characterization or explanation of their "beyond mere negligence" standard.

Ultimately, the concepts of gross negligence and recklessness cannot appropriately be applied to the services provided by government officials. Those officials are required, with limited resources, to evaluate risks on a daily basis. A police desk sergeant must decide the order in which the police will respond to emergency calls. Overloaded caseworkers must decide the relative seriousness of all cases of suspected child abuse. Hindsight can make any decision look reckless when, as here, tragic consequences ensue. If gross negligence or recklessness claims are actionable under the Due Process Clause, the day-to-day functioning of state and local government officials will become a constant source of Section 1983 litigation. Plainly, that Clause was never intended to encompass the routine administration of state and local governments. *See Davidson v. Cannon*, 474 U.S. at 347-48. Given the Court's concern not to trivialize the Due Process Clause, it is neither necessary nor sensible to divert a potentially limitless volume of ordinary tort cases from state to federal court for trial.

III. NO POLICY HAS BEEN SHOWN TO ESTABLISH THE COUNTY'S LIABILITY UNDER *MONELL v. DEPARTMENT OF SOCIAL SERVICES.*

Even if petitioners could establish first, that petitioners had a constitutional right to government intervention to prevent Randy DeShaney's abuse of Joshua, and second, that respondents' actions (or nonactions) deprived them of that right in a manner proscribed by the Due Process Clause, the principles of local government liability under Section 1983 first delineated in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), would preclude any recovery from the County and the Department.[24]

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[24] Although the *Monell* issue was not addressed by the courts below, the Court may rely on grounds not previously raised to affirm the judgment of the lower court. *Dandridge v. Williams*, 397 U.S. 471, 574 n.6 (1970). Because petitioners' own submissions establish the absence of the requisite policy under *Monell*, a remand for further consideration of this issue is not necessary.

In *Monell*, the Court held that local government agencies could be held responsible under Section 1983 for the acts of their employees only if those acts were executed pursuant to a "policy or custom." 436 U.S. at 694. The policy or custom must be " 'the moving force of the constitutional violation.' " *Polk County v. Dodson*, 454 U.S. 312, 326 (1981), citing *Monell*, 436 U.S. at 694. Implicit in *Monell* is the recognition that local governments should not routinely face damage claims for alleged constitutional violations by their employees unless such bodies are directly responsible for the violations.

In this case, the County's operative policy was "to seek out and prevent child abuse." Pet. Br. at 19. As petitioners themselves explain, the Department's Child Protection Unit was created "in response to the declared policy of Wisconsin law mandating specific efforts to protect endangered children and intervene on their behalf." *Id.* at 4. Petitioners' claims against Ms. Kemmeter thus rest in large measure on her alleged failure to follow the Department's guidelines. See *id.* at 7 (failure to visit frequently); *id.* at 8 (failure to inform natural mother of risk).

Petitioners cannot have it both ways. Having asserted that their due process deprivation resulted from Ms. Kemmeter's failure to follow the County's policy, they cannot also claim (as they must under *Monell*) that the policy itself caused the violation of their constitutional rights.

Even if petitioners could show that County policy played a causal role in any constitutional violation, liability against the County and the Department would be barred by the rule of *Monell*, as explained in later cases. First, as the plurality opinion articulated in *City of St. Louis v. Praprotnik*, 108 S.Ct. 915, 926 (1988), a local government "cannot be held liable under § 1983 unless [the claimant] proved the existence of an unconstitutional

municipal policy." [25] Here, petitioners do not dispute the constitutionality of the County's avowed policy, and, like the claimant in *Praprotnik*, they have adduced no evidence that departure from that policy was either authorized by County policymakers or sanctioned by widespread custom or practice.

Second, petitioners' only evidentiary basis for the County's liability is Ms. Kemmeter's failure to intervene in this single case. Because *Monell* precludes respondeat superior liability for her alleged shortcomings, petitioners cannot pursue their claims against the County and the Department based on Ms. Kemmeter's violations of their policies. In *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), the plurality concluded that a single incident of misfeasance by a subordinate cannot provide the sole basis for inferring a policy under *Monell*. *Id.* at 824.[26] To find the County or the Department liable on the facts of this case, given the absence of direct evidence that they were at fault, would impose respondeat superior liability in another guise.

IV. THE INDIVIDUAL RESPONDENTS ARE ENTITLED TO OFFICIAL IMMUNITY.

Just as the absence of a policy defeats petitioners' claims against the County and the Department, official immunity

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[25] As *amici* have urged the Court in a brief *amicus curiae* submitted in *City of Canton v. Harris*, No. 86-1088, this conclusion follows logically from *Monell* and its progeny, *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985); *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986); and *Praprotnik*. Our brief in *City of Canton* is being served on the parties to this case simultaneouly with this brief.

[26] Because Ms. Kemmeter was not a municipal policymaker, the County respondents cannot be liable for the single alleged episode of incompetence on which their claims are based. *See Praprotnik*, 108 S.Ct. at 924; *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986).

protects the individual respondents from liability.[27] Accordingly, the judgment of the court of appeals should be affirmed even if a constitutional violation were shown.

It requires little analysis to show that the individual respondents cannot be held liable in this case. Child welfare workers, as executive officials performing discretionary functions, have routinely been held entitled to qualified official immunity. *See Austin v. Borel*, 830 F.2d 1356, 1363 (5th Cir. 1987); *Jensen v. Conrad*, 747 F.2d 185, 195 (4th Cir.), *cert. denied*, 470 U.S. 1052 (1984); *Donald M. v. Matava*, 668 F.Supp. 703, 707-13 (D. Mass. 1987).

It is now settled that qualified immunity protects officials from suit "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Given the novelty of petitioners' claims, Ms. Kemmeter and Ms. Stelse could not have known that they had an affirmative constitutional duty to a child residing with his father. There was no published case on point until more than a year after the alleged due process violation (*see Estate of Bailey v. County of York*, 768 F.2d 503 (3d Cir. 1985)), and no clear rule has emerged even today. *See Harpole v. Arkansas Dep't of Human Services*, 820 F.2d 923 (8th Cir. 1987) (no constitutional duty to prevent child abuse where the child resided with his parent). Because the individual respondents' conduct unquestionably fell within the scope of qualified immunity, they were entitled to summary judgment on this separate ground.

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[27] Although respondents pleaded official immunity in their answer (Answer, Affirmative Defense No. 2, J.A. 28), and raised this issue in the district court, neither the district court nor the court of appeals considered official immunity in ruling in favor of respondents. As with *Monell*'s limitations on municipal liability, official immunity is offered in support of the judgment below. *See Dandridge v. Williams*, 397 U.S. at 475 n.6.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

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